

Golden Bay Freight Lines and Brotherhood of Teamsters and Auto Truckdrivers, Local 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Case 20-CA-17237

26 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
JENKINS AND HUNTER

On 17 December 1982 Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's finding that the Union had an adequate opportunity to request bargaining about Respondent's decision to close its Redwood City facility and that by failing timely to request such bargaining it waived any rights it may have had to bargain, we note that the circumstances surrounding Respondent's decision to close warranted its quick action. It is undisputed that Respondent was facing financial ruin. Its plight was exacerbated by the fact that it was already 4 to 5 months behind in rental payments due for the Redwood City facility and was facing possible eviction by a new landlord; the Internal Revenue Service was threatening to close Respondent's remaining facilities because it had defaulted twice on taxes due for the Redwood City facility; and Respondent had been informed by its business consultant that its most recent contract proposal (which the Union had already called "ridiculous") did not provide the relief necessary for Respondent to survive financially. We also note that, in his letters of 22 June and 23 June to Union Representative Baker, Livesay indicated that closure of the facility was only a possibility under consideration and requested simply that Baker contact him to discuss the situation. Significantly, according to Livesay's uncontradicted testimony, Baker and former employee Painter indicated at a subsequent meeting that the employees and union representatives had not believed Respondent was serious about closing the facility.

While agreeing with the result in this case, Member Jenkins relies not on Respondent's financial circumstances, but on the Union's lack of diligence in responding to Respondent's requests, in the first half of 1982, that the parties bargain for a new contract. As described in the attached Decision, Respondent had often related to the Union its claims of economic ill health and its need for help in lowering labor costs. Nevertheless, the Union demonstrated remarkably little concern for dealing with Respondent over these matters, choosing, instead, to devote its attention to other negotiations, with other employers, resulting in our finding a waiver of its bargaining rights.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: This proceeding in which a hearing was conducted on October 25 and 28, 1982, is based upon an unfair labor practice charge filed on July 12, 1982,¹ by Brotherhood of Teamsters and Auto Truckdrivers, Local 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and upon a complaint issued on August 27, 1982, by the General Counsel of the National Labor Relations Board, herein called the Board, alleging that Golden Bay Freight Lines, herein called Respondent, was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, herein called the Act. Specifically, the complaint in pertinent part alleges that the Union represented an appropriate unit of employees employed at Respondent's Redwood City facility, and that on July 3, 1982, Respondent closed the facility and contracted out the work previously performed by the unit employees, and engaged in this conduct "without having afforded the Union an opportunity to negotiate and bargain . . . with respect to such acts and conduct." Respondent filed an answer to the complaint denying the commission of the alleged unfair labor practices.²

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

FINDINGS OF FACT

The Alleged Unfair Labor Practices

A. The Evidence

Respondent, a sole proprietorship owned and operated by James Livesay, is an intrastate trucking company. It picks up and delivers freight in northern California. During the time material herein it operated four terminals in northern California: Redwood City, Sacramento, Visalia, and Modesto. The Redwood City terminal was substantially larger than the others. Respondent earned more income from its Redwood City terminal business than from the business of all of the other terminals taken together. Likewise it cost Respondent more to operate

¹ The charge was amended on August 2 and 25, 1982.

² Respondent admits that it is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and that it meets the Board's applicable discretionary jurisdictional standard. Respondent also admits that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

the Redwood City terminal than all of its other terminals taken together. During 1978, 1979, 1980, and 1981, each year Respondent operated a deficit.

The Redwood City terminal, which serviced the San Francisco Bay area, opened in January 1981. Before that, from approximately 1974 until the opening of the Redwood City terminal, Respondent served its customers in the San Francisco Bay area from its San Carlos terminal. In January 1981 Respondent relocated the San Carlos terminal to Redwood City. The Union has always represented the truckdrivers and dockworkers employed at the San Carlos and Redwood City terminals. The most recent collective-bargaining contract between Respondent and the Union covering these employees was effective from April 1, 1979, until March 31, 1982. This contract really consisted of two agreements; namely, the National Master Freight Agreement and the Local Pickup and Delivery Supplemental Agreement. At the time it entered into this contract Respondent was part of a multiemployer bargaining unit comprised of several companies which, like Respondent, were in the trucking business solely within the State of California.

During the negotiations which resulted in the 1979-82 contract, Respondent's owner, Livesay, notified both the Union and his employees that Respondent was unable to compete with his nonunion competitors whose labor costs were substantially less than Respondent's and that, if Respondent expected to stay in business, it needed relief from some of the economic provisions contained in the National Master Freight Agreement. But Respondent and the other California trucking companies which negotiated as part of the same bargaining group were unsuccessful in persuading the Teamsters Union to vary, for their group, any of the terms of the 1979-82 National Master Freight Agreement which had been negotiated between the Teamsters Union and the interstate carriers.

On March 21, 1980, Livesay wrote the Union seeking relief from some of the economic provisions contained in the 1979-82 National Master Freight Agreement. Livesay wrote that Respondent was continuing to lose money and, among other things, stated:

On April 1, 1980 if I pay the 81 cent increase in hourly wages and increase the sick days to 11 and the extra paid holiday and the extra monies paid in the health and welfare and pension and trust it will put me out of business.

* * * * *

The only way for this company to exist is not to pay the 81 cents per hour increase April 1, 1980 and get staggered starting times to eliminate some of our costly overtime. And for the person supposedly off on sick leave not to be paid for the first two days off . . . Then and only then could we become a profitable local short haul carrier.

Also, on April 29, 1980, Livesay wrote the representatives of the Western Conference of Teamsters and the California Trucking Association, the parties that had negotiated the collective-bargaining agreement to which he was a party, and repeated the earlier appeal he had made

to the Union for relief from certain economic provisions of the 1979-82 National Master Freight Agreement. In this letter Livesay, among other things, noted that 70 percent of all of his revenue was devoted to labor costs and that his major competitors did not have comparable labor costs because they were nonunion and not bound by the terms of a union contract. The letter concluded: "I am *certain* that unless some contractual relief is granted, our continued growth and success is very much in jeopardy." Respondent's above-described efforts to secure economic relief in terms of its contract were unsuccessful.

During 1980 and 1981 Respondent's financial situation got progressively worse until by 1981 it was losing approximately \$10,000 monthly. One reason for this was that, because of changes made by the State of California in the regulation of intrastate trucking companies, these companies were now permitted to reduce their rate substantially. Respondent's nonunion competitors, whose labor costs were not tied to collective-bargaining agreements, had done this, thereby taking business away from Respondent. In August 1981 Respondent's financial problems became critical when it was unable to pay to the United States Internal Revenue Service over \$150,000 of employees' payroll taxes which it had previously deducted from employees' wages. During this period in 1981 Livesay met with his Redwood City terminal employees and told them about the Company's financial difficulties and stated that he felt that one of the reasons for these difficulties was due to the unfair terms set by the National Master Freight Agreement. Livesay asked the employees whether they would grant the Company relief by staggering their starting times, stop abusing their sick leave, and taking a 20-percent reduction in pay. In response the dockworkers who worked on the night shift indicated they would be willing to work from 5 p.m. to 1 a.m. rather than from 4 p.m. to midnight, thus saving the Company from paying 1 hour of overtime pay. Also, some of the truckdrivers indicated they would be willing to work through their lunch period.

In August 1981 Livesay hired Ronald Johnson, a business consultant, to determine why Respondent was losing money and to turn Respondent into a profit-making enterprise. Johnson informed Livesay that the labor costs of the Redwood City facility were substantially greater than those of the other terminals, recommended that when the Company's collective-bargaining contract with the Union came up for renewal Respondent negotiate on an individual basis rather than as part of a multiemployer group, and advised Livesay that he should start considering the possibility of closing the Redwood City terminal. In addition, Johnson proposed a plan for submission to the IRS whereby Respondent agreed to pay the approximately \$150,000 it owed the IRS in monthly installments. This plan, which was premised in part upon Respondent's cutting its labor costs, was accepted by the IRS.

In October 1981 Livesay wrote the Union that Respondent was withdrawing from the multiemployer bargaining unit and that he desired to enter into individual negotiations with the Union for a contract to succeed the

1979-82 contract. The Union did not answer this letter. Thereafter, in 1981, Livesay phoned union representative Baker on four or five occasions for the purpose of setting up a contract negotiation meeting. Union representative Dindia, rather than Baker, returned Livesay's phone calls. When Livesay told Dindia he wanted to meet to negotiate his contract, Dindia stated that only Baker could do this and that Baker was unavailable inasmuch as he was tied up negotiating with other employers. Also, when Dindia later in 1981 visited Respondent's Redwood City terminal, Livesay told him that if Respondent was not given some relief from the terms of its current contract Respondent was definitely going to have to move out of the Redwood City area. Dindia stated that Baker was the only person who had authority to grant any relief and, with respect to the negotiations for a new contract to replace the existing contract, Dindia told Livesay that first the National Master Freight Agreement would be negotiated, then the Union would negotiate agreements with the different groups of employers, and only then would the Union sit down for negotiations with the individual trucking companies such as Respondent.

In October 1981, at Livesay's instruction, business consultant Johnson spoke to union representative Baker about the Union's granting Respondent relief from some of the economic terms of the current collective-bargaining contract. Johnson introduced himself to Baker, told him Respondent was in deep financial difficulty, and told him about Respondent's problems with the IRS. Baker stated that he knew Respondent was having financial difficulty. Johnson informed Baker that Livesay had told him that there were some trucking companies covered by the National Master Freight Agreement whose employees had granted them contractual relief and that Livesay wanted to know what he had to do to get similar relief, particularly in the areas of staggered starting times and a general reduction in wages. Baker acknowledged that some of the trucking companies did have staggered starting times which had been worked out on an informal basis between the companies and their employees and told Johnson that if Respondent and its employees worked out something similar and there were no complaints from employees the Union would not object. Johnson also indicated that he understood that the employees at a trucking company under contract with the Union had agreed to take a 10-percent reduction in their wages. Baker stated that if Respondent could work out something similar with its employees the Union would not object. Johnson relayed this conversation to Livesay, who instructed him to meet with the workers at the Redwood City terminal to determine whether they would be amiable to granting Respondent relief from some of the economic provisions of the current contract.

Early in October 1981, pursuant to Livesay's instruction, Johnson met with Respondent's truckdrivers at the Redwood City terminal. He advised them of Respondent's poor financial condition and of his above-described conversation with union representative Baker. He told them that Respondent's single largest cost item was the labor costs of the Redwood City terminal and that because of this Respondent was looking to the drivers to

make concessions to help Respondent achieve financial success. The truckdrivers indicated they were not prepared to sacrifice any of the economic benefits they were receiving under the current collective-bargaining contract.

During the period from January through March 1982, when union representative Dindia visited Respondent's Redwood City terminal, Livesay asked Dindia how the negotiations for the National Master Freight Agreement were coming. Dindia stated that it looked as though there would be a settlement very soon, but told Livesay that after this settlement the Union would negotiate first with the various multiemployer groups and only then would it negotiate with the individual companies such as Respondent. Livesay asked why the Union could not negotiate with him first. Dindia stated "that's the way it goes." Thereafter in 1982, after the contract terminated on March 31, Livesay more than once indicated to Dindia that he wanted to negotiate a new contract with the Union. Dindia informed him that he would have to wait inasmuch as the Union was now negotiating with the various groups of employers and that Respondent's contract would be one of the last the Union would negotiate.

On June 18, 1982,³ Livesay wrote Baker asking for a contract negotiation meeting and enclosing a proposed contract. His letter reads as follows:

Enclosed is [Respondent's] proposal for your review. We would like to meet with the necessary parties to discuss negotiations as soon as possible.

In the event we are not contacted within 10 days of receipt of this proposal, this agreement will go in effect on July 1, 1982.

On June 21 union business agent Dindia phoned Livesay and informed him that the Union had received his "ridiculous offer" and that July 6 was the earliest the Union's negotiators could meet with him to discuss his proposal. Livesay agreed to meet with the Union on that day.⁴ This was the only communication, verbal or otherwise, between a representative of the Union and a representative of Respondent until the July 6 meeting which is described below.⁵

³ Unless otherwise specified all dates hereafter refer to 1982.

⁴ The date of Dindia's above conversation with Livesay and the description of the conversation is based upon the testimony of Livesay, who impressed me as a credible witness. Dindia testified that it was "very possible" that he phoned Livesay on June 21 and at that time arranged for the July 6 negotiation meeting. He did not deny Livesay's version of the conversation.

⁵ Based upon Livesay's testimony. Union business agent Dindia testified for the General Counsel that on or about June 24, after the Union's receipt of the June 18, 22, and 23 letters from Livesay, he phoned the Redwood City terminal and asked to speak to Livesay, that Respondent's general manager, Richard Foster, told him Livesay was not there and gave him a phone number where he thought Livesay could be reached, that when Dindia phoned this number a man answered the phone, and that Dindia identified himself and asked for Livesay and was told that Livesay would be informed that Dindia had phoned. Dindia further testified that within the next 2 days either Livesay or Livesay's lawyer phoned him at the Union's office at which time the July 6 meeting was scheduled. On cross-examination Dindia inconsistently testified that upon

Continued

On June 21 General Manager Foster met with the Redwood City terminal employees represented by the Union. He told them that he was not allowed to negotiate a contract or bargain with them directly, but that the Company had sent a contract proposal to the Union and if the employees wanted to know what the proposal contained they would have to contact their business agent. Foster also told them that if Respondent continued to lose money it would be unable to operate and there was a possibility that the terminal would be closed.

On June 21 Joe Hurley, a business representative for Teamsters Union Local 856 which represented the clerical workers employed at the Redwood City terminal, phoned Livesay and told him that Local 856 intended to picket the Redwood City terminal on July 6 unless Respondent entered into contract negotiations with that Union. The record establishes that Local 856's contract with Respondent covering the Redwood City terminal's clerical workers had terminated and that on June 4, after receiving a letter signed by a majority of the clerical employees stating they did not want to be represented by Local 856, Livesay wrote Local 856 withdrawing recognition and refusing to bargain with that union.

On June 21 Respondent's business consultant, Johnson, met with Livesay after learning that Livesay had defaulted on his June payment of \$4,500 to the IRS and that the IRS was demanding that Livesay pay all of the more than \$100,000 owed to the IRS. The meeting started in the afternoon and continued on into the evening. Johnson reviewed the terms of the collective-bargaining contract which Livesay had proposed to the Union and told Livesay that even if the Union accepted this proposal in its entirety the Company's survival would still be in jeopardy because of the enormous amount of Respondent's debts. They discussed a number of subjects, including the Company's situation with the IRS, the fact that the Company was 5 months behind in its monthly rental payment for the Redwood City terminal and might be evicted from that terminal, the high cost of renting the Redwood City terminal—\$3,000 a month, and the possibility that on July 6 Local 856 would carry out its threat to picket Respondent. Johnson recommended that Livesay either get the Union to agree to a collective-bargaining contract which was even more favorable to Respondent than the one Livesay had already proposed or seriously consider shutting down the Redwood City terminal and moving the operation elsewhere.⁶

On June 22 Livesay wrote Baker as follows:

receipt of Livesay's June 18 letter to the Union it was "very possible" that on June 21 he phoned Livesay and during that conversation arranged for the July 6 meeting. Foster, who impressed me as a credible witness, specifically denied Dindia's testimony that he spoke with Foster. In view of Dindia's inconsistent testimony, Foster's credible testimony that Dindia did not speak to him, Livesay's credible testimony that Dindia phoned him on June 21 to arrange the July 6 meeting, and the poor impression that Dindia made while testifying, I have rejected Dindia's above-described testimony that he attempted to contact Livesay after the receipt of all three of Livesay's letters and eventually spoke to Livesay shortly after June 24.

⁶ The above description of what was stated at the June 21 meeting between Johnson and Livesay is based upon a composite of their testimony.

This is to inform you that [Respondent] is seriously considering a move out of Joint Council 7 jurisdiction for economical reasons.

I would like to meet with you as soon as possible and discuss this matter.

The next day, June 23, upon the advice of his lawyer, Livesay wrote another letter to Baker which reads as follows:

Yesterday we wrote to you concerning the possibility of the complete shutdown of our operation in Redwood City, California. As I stated, we are seriously considering a transfer to a different location.

If you would care to discuss this before our final decision is made, please contact me in writing by July 1, 1982. If you would rather meet with me personally at any time prior to July 1, please advise.

If I do not hear from you by July 1, 1982 we will make our decision without benefit of your opinion, regarding the closure of our Redwood City facility.

It is undisputed that the above-described letters were delivered to the Union during the usual course of postal delivery. As I have found *supra*, neither Baker nor any other representative of the Union communicated with Livesay or with any other representative of Respondent in response to Livesay's above-described letters.

On July 2 Livesay decided to close the Redwood City facility. Livesay testified that the factors which caused him to reach this decision were as follows: "The total cost of operating in another area compared to the cost of operating [the Redwood City terminal]"; "threat of strike [referring to the threat of Local 856 to picket on July 6]"; "threat of being evicted from the terminal"; "paying back to the IRS"; "trying to live with a contract that I felt as though I could not live with, where I'd had past experience with others"; and the "unfair advantages that I felt that other carriers had over carriers that were obligated to a union contract." Livesay further testified that his lack of success in the past in persuading the Union to make contract concessions had a "big impact" upon his decision to close the Redwood City terminal.

On July 2 each of the employees represented by the Union at the Redwood City terminal received a letter from Livesay informing them of the closure of the terminal. This letter read as follows:

As we have previously advised your union, the company has been considering the complete shut down of our Redwood City Terminal.

The Union hasn't met with us to discuss this matter. We have now reached a decision to close our Redwood City terminal. Accordingly, this is your notice, pursuant to [the union contract], of permanent layoff.

Enclosed are checks covering all wages and vacation pay due you through July 2, 1982.

The employees were in fact at this time paid their wages and accrued vacation pay.⁷

On July 2 Livesay wrote each one of Respondent's customers who were being serviced from the Redwood City terminal as follows:

Dear Valued Customer:

I am writing you because Golden Bay is undertaking a major change in operation.

As you are well aware, the trucking industry has been undergoing severe times. A significant number of my competitors have had to close their doors and over one half of the largest ten trucking companies lost money last year. Golden Bay's performance has been no exception. We have been caught between de-regulation, the recession and high fixed costs. As a result the Golden Bay system is undergoing a dramatic restructure in order to survive.

Effective July 2, 1982 Golden Bay will be closing its Redwood City operation. However, we will continue to meet this areas trucking needs.

This decision is not easy; in fact, it was quite agonizing, but faced with an economic situation which threatens the survival of the company, I have no choice.

What does this mean for you? I believe that you our valued customers will benefit in at least three ways.

1. Golden Bay will have more flexibility in meeting your pickup and delivery requirements.
2. Golden Bay will be able to continue to provide you with quality service at the lowest possible cost.
3. Golden Bay will survive and be in [a] better position to meet both your short term and long term needs.

I recognize that this decision may cause a few temporary difficulties, but I trust you will continue to provide us the opportunity of serving you.

Finally, Golden Bay is very appreciative of having you as a customer.

Sincerely,

/s/ James W. Livesay

James W. Livesay

Owner, Golden Bay Freight Lines

P.S. We can still be reached at 365-3820 until further notice.

On Friday, July 2, Livesay informed his lawyer, Robert Hulteng, about his July 6 negotiating meeting with the Union, which had been scheduled prior to Livesay's decision to close the Redwood City terminal, and asked if he should attend it. Hulteng advised him to attend and agreed to accompany him.

On the morning of July 6, at the Union's office, Hulteng, Livesay, and Johnson for Respondent met as sched-

uled with union representative Baker, Dindia, and Rodriguez.⁸

Baker opened the meeting by stating that he had been informed that the Company had closed its Redwood City terminal. Livesay replied that he had no choice. Hulteng and Livesay pointed out that Livesay had written Baker about the possibility of a closure, but that Baker had not responded to his letters. Baker disputed this. He stated that Dindia had contacted the Company. Hulteng stated that he understood that this was not the case. Livesay stated that Hulteng's understanding was correct. The discussion then shifted to another topic.

Livesay informed the union representative about the reasons for his decision to close the terminal. He explained that he owed the IRS approximately \$150,000, that he was 5 or 6 months behind in his rent at the terminal, that he had been asking the Union for contractual relief for years without any success, and that his letters to the Union asking for a meeting to discuss the possibility of closing the terminal had not been answered.

Baker told Livesay that the Union planned no action against Respondent if in fact the Redwood City terminal was closed, but that the Union understood that Livesay was either planning to open or had in fact already opened another terminal in the bay area. Livesay denied this. He stated that Respondent intended to service the area formerly serviced by the Redwood City terminal using its own employees who worked at the Modesto terminal and by the use of independent contractors. Livesay explained that Respondent's Modesto employees would drop trailers off at various sites within the bay area and that independent contractors would deliver this merchandise. Baker stated that he was not concerned about the Company's use of independent contractors, but just wanted to know if there would be any employees of Respondent working out of a terminal in the bay area. Livesay answered no, but advised Baker that, until Respondent was able to make arrangements in the immediate future to remove the telephones and radio from the Redwood City terminal, he would have a dispatcher operating the radio and a clerical answering the telephones at that facility.

Hulteng at this point informed Baker that the Company was prepared to bargain with the Union about the effects of its decision to close the terminal. Baker answered that he knew that Respondent had a legal obligation to do this and asked about severance pay for the employees. Hulteng stated the Company was not in an economic position to pay severance pay. He pointed out that the reason for the closure of the terminal was because Re-

⁸ Respondent called as witnesses Hulteng, Livesay, and Johnson to testify about this meeting. The General Counsel called Baker. The above description is based upon a composite of the testimony of Hulteng and Livesay, who impressed me as credible witnesses. Johnson corroborated their testimony in most significant respects. Baker's testimony conflicted with the testimony of Respondent's witnesses in only one significant respect. Baker testified that he advised Livesay that the Union was prepared to grant the Company certain contractual relief in the areas of starting time, premium pay, and wages which he told them should enable the Company to continue to operate the Redwood City terminal. This was denied by Hulteng, Livesay, and Johnson. I have rejected Baker's testimony because Hulteng, Livesay, and Johnson impressed me as more credible witnesses.

⁷ Respondent had to borrow \$15,000 to make this payment.

spondent was losing money. Livesay echoed Hulteng's remarks and stated that severance pay was out of the question because of the Company's bad financial condition, but that he had paid the employees everything they had coming to them. Livesay also stated that he intended to make the employees' health and welfare and pension fund payments for the month of June. He also agreed to settle two pending contractual grievances filed by employees, but stated he intended to contest another pending grievance.

The meeting ended with Baker's acknowledging that Livesay had serious financial problems and stating that he was sorry "it had come to this"; he wished Livesay luck, but warned him that there might be some picketing if the Union observed trailers with Respondent's name on them operating in the bay area and that the Teamsters Union would probably attempt to organize Respondent's other terminals.

On July 12, 1982, the Union filed its unfair labor practice charge in this case. The charge alleged that Respondent violated Section 8(a)(1) and (3) of the Act by terminating its union employees and hiring nonunion workers to take their place for the purpose of avoiding a collective-bargaining relationship with the Union and also alleged that Respondent was transferring unit work to locations where nonunion employees were performing such work in order to avoid bargaining with the Union. The charge did not allege that Respondent had breached its bargaining obligation by closing the Redwood City terminal, and this allegation was never raised until a second amended charge was filed on August 25, 1982.

In the month of July, on July 12, and during the first week in August, Respondent and the Union exchanged correspondence in which, among other things, they disputed whether the Union had responded to Respondent's letters of June 22 and 23 dealing with the contemplated closing of the Redwood City terminal, and disputed what was said during the July 6 meeting. In addition, the Union's July 12 letter asked for a meeting with Respondent "for the purpose of resolving the present dispute." In its letter of reply to the Union dated July 20, Respondent, through its lawyer, advised the Union that Respondent's decision to close the Redwood City terminal "is a final one," that the Union at the July 6 meeting had indicated it had no proposals with respect to effects bargaining, and that under the circumstances Respondent would agree to meet with the Union only if the Union provided a reason for such a meeting. By its letter of reply to Respondent dated July 27 the Union informed Respondent that it was demanding a meeting to bargain about "your subcontracting decision and all related subjects." Respondent, through its lawyer, replied by letter dated August 5 informing the Union's lawyer: "If either you or Baker desire to make any proposals with respect to the effects of this decision, the Company would still be happy to consider them. Please feel free to contact me if you wish to discuss this matter further."

Thereafter in August, at Baker's request, Livesay met with Baker at which time Baker told him that the Union was prepared to give him a good contract which would give him relief in all of the areas where he needed relief such as starting time, premium work, shift differential,

and wages. Livesay told Baker to reduce his proposal to writing and present it to him. No such written proposal was ever submitted to Respondent.

On September 7 Livesay and his lawyer met at the Union's office with Baker and the Union's lawyer. Also present was employee Painter. Baker indicated that if Respondent reopened the Redwood City terminal it would not be necessary for Livesay to rehire all of the workers on the seniority list. Baker also indicated that if Respondent reopened the terminal the Union was prepared to negotiate a contract covering that facility which would give Respondent substantial economic relief in a number of areas, which Baker then enumerated. Baker offered to meet with Respondent during the remainder of the week and into the next week in an effort to reach a collective-bargaining agreement which would enable Respondent to resume operations at the Redwood City terminal. Baker stated that during this period of negotiations the Union would stop picketing Respondent. Livesay agreed to consider the Union's proposal.

On September 9 Respondent's lawyer wrote to the Union's lawyer in response to the Union's September 7 proposal as follows:

I have been asked by Mr. James Livesay of Golden Bay Freight Lines to write to you regarding our meeting of September 7, 1982. As was stated at the meeting, the Company has permanently closed its Redwood City terminal, and will not be reopening it. It continues to be the Company's position that any bargaining obligation it may have had with the Union with respect to this closure was fully met. Nevertheless, without prejudice to that position, the Company was willing to meet with the Union for purposes of negotiating in good faith about possible resumption of operations in the Bay area.

The various proposals offered by the Union at our meeting have been carefully considered by the Company. As the Union is well aware, the Company faces serious economic difficulties which necessitated the closure of the unprofitable Redwood City terminal. After careful consideration, the Company has concluded that the various options offered by the Union offer no prospect of the economic relief necessary to justify a resumption of operations in the Bay area. Accordingly, the Union's various proposals for a new contract must be denied.

The Company continues to be willing to negotiate in good faith with the Union about a new contract. The Company remains hopeful that the Union will finally recognize the extreme financial difficulties in which the Company finds itself. The decision to close the Redwood City terminal was not reached lightly; it was forced upon the Company by the current economic conditions. The Company invites any specific proposals the Union may have for a contract which will realistically address the Company's needs. Such proposals will be very carefully considered by the Company.

If you or Mr. Baker believe that another meeting would be fruitful, or if the Union has any proposals to offer, please contact me.

On September 14 the Union's lawyer wrote to Respondent's lawyer in response to his September 9 letter, in pertinent part, as follows:

Your letter states that the Company has come to its decision because it cannot afford to operate under any agreement that might be reached within the guidelines suggested by the Union. Those guidelines were very broad and the Union does not understand how the Company can come to such a decision without at least making some attempt to meet and explain just what kind of relief it is seeking.

The Union remains willing to negotiate some settlement with the Company and to meet in an attempt to reach agreement. But, since it is the Company that has the facts and figures on what it needs to operate under a contract and because it is the Company that says it cannot operate under any agreement that might be reached within the guidelines offered by the Union, it is the Company rather than the Union which has the responsibility at this point to make a proposal for possible agreement. If you have any such proposal to make, please contact either me or Jim Baker.

Local 85 continues to demand that the Company reinstate and make whole the drivers and loaders formerly employed at the Redwood facility. Local 85 continues to demand that Golden Bay meet and negotiate in good faith with respect to its decision to subcontract bargaining unit work.

In late September 1982 Baker phoned Livesay and told him that he had some written proposals to present to Livesay which Baker stated he felt might get him off "dead center." Livesay agreed to meet with Baker early in October but was unable to meet with him at the scheduled time due to a medical appointment. However, the meeting was rescheduled for October 14 between union representative Dindia and Livesay at which time Dindia presented Livesay with a written document on the Union's stationery which reads as follows:

The following proposals are to be discussed:

- 1) Reimburse employees for wages lost during this (layoff) (as of July 2, 1982) termination.
- 2) All grievances to be paid to employees.
- 3) Reopen terminal in Local 85 area and offer all employees reinstatement (whomever [sic] desires to be rehired).
- 4) If these proposals are met, we (employees) will negotiate a contract regarding relief to Golden Bay in the form of pay scale, starting times, holidays, sick leave, etc.

Dindia, as he handed the proposals to Livesay, stated, "[T]hese could even be modified." There was no discussion about the proposals.

On October 19 Respondent, through its lawyer, responded to the Union's October 14 proposal by letter which, in pertinent part, reads as follows:

The Union's demand is unacceptable to the Company. As you are well aware, the Company could not afford to continue to operate its Redwood City terminal, and therefore made the decision to close it. The Company is in no position to reopen the terminal or to otherwise satisfy the three demands of the Union. The Company is prepared, and has been for some time, to negotiate with the Union regarding a proposed contract under which the Company could possibly afford to operate a terminal in the Bay area.

The Company regrets that the Union is unwilling to negotiate a contract at this time. Clearly, absent some contractual agreement that would make it economically feasible for the Company to operate, the Company cannot consider reopening a terminal in the Bay Area. If the Union's position subsequently changes, please let me know.

Before the Redwood City terminal closed on July 2 the dockworkers represented by the Union handled the freight which the drivers represented by the Union picked up and delivered in the San Francisco Bay area. Since the terminal closed, Respondent has continued to do business in the San Francisco Bay area. Some of the work formerly performed by the employees represented by the Union is now being performed by independent contractors whom Respondent has contracted with to do this work, and the remainder of the work is now being performed by Respondent's employees who are employed at Respondent's other terminals, primarily the Modesto terminal. In general, the independent contractors perform that part of the work previously done by the union-represented workers which is farthest away from the Modesto terminal, i.e., in the San Francisco Bay area,⁹ whereas Respondent's employees perform that part of the work previously done by the union-represented employees which is closer to the Modesto terminal, i.e., in the East Bay area. Although the volume of business done by Respondent in that part of the San Francisco Bay area formerly serviced by the union-represented workers has decreased by approximately 25 to 35 percent since the closure of the Redwood City terminal, this has not occurred because Respondent has intentionally cut back its operation in that area; rather, it is clear that when Respondent closed the terminal and changed its method of operation in the San Francisco Bay area its intent was to retain all of its existing customers in that area and if possible to even increase its busi-

⁹ The freight delivered to Respondent's San Francisco Bay area customers by the independent contractors is invoiced and loaded onto trailers at the Modesto terminal by Respondent's dockworkers. Respondent's Modesto linedrivers haul the freight to the San Francisco Bay area where the trailers are dropped off at a designated location and picked up by the independent contractors. The independent contractors deliver the merchandise, pick up merchandise, and drop off the trailers at the designated drop area with the freight they have picked up. The Modesto terminal linedrivers pick up the trailers and haul them back to Modesto where the freight is processed.

ness there. As a matter of fact Respondent, since the closure, has acquired some new customers in the area.

There is insufficient evidence that Respondent did not close its Redwood City terminal on July 2. I recognize that for approximately 2 weeks after the closure Respondent, whose lease of the premises lasted until at least the end of August,¹⁰ continued to employ a dispatcher and a clerical worker there to operate the radio and telephones until it was able to arrange to have the radio and telephones moved to the Modesto terminal. During this 2-week period Respondent also refueled its tractors using the gasoline storage tank in the terminal's yard until the supply of gasoline there was depleted. Also during this 2-week period Respondent occasionally used the yard of the terminal as a drop off point for its trailers, which, as described *supra*, were dropped off by linedrivers from the Modesto terminal and picked up by the independent contractors. These activities which took place for only a limited period of time do not warrant an inference that Respondent, after July 2, continued to operate the Redwood City terminal. Likewise, employee Painter's testimony that from July 6 through July 17 on an almost daily basis he observed trucks backed up to the dock at the Redwood City terminal and observed persons moving around on the docks is insufficient to establish that Respondent was continuing business as usual at the Redwood City terminal. Painter was unable to determine whether freight was being loaded or unloaded or whether there was any freight being handled on the dock of the terminal. The sole evidence presented by the General Counsel that after the July 2 closure there was freight being handled at the terminal is the testimony of employee Pingone that once he observed a carton of ice cream cones being transported on the dock. Finally, the fact that the terminal dispatcher, who remained working at the terminal until the radio was moved to the Modesto facility, was observed one day picking up freight at the premises of three customers no more establishes that the Redwood City terminal was still in operation than does the fact that Respondent's Modesto employees picked up the freight from San Francisco Bay area customers.

B. Conclusionary Findings

As described in detail *supra*, on July 2 Respondent closed its Redwood City terminal; terminated the terminal's employees, including the union-represented employees; and reassigned the work formerly done by the union-represented employees to independent contractors and to employees employed by Respondent at its other terminals. The complaint alleges that Respondent engaged in the aforesaid acts and conduct "without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the employees of Respondent with respect to such acts and conduct," thereby violating Section 8(a)(5) and (1) and Section 8(d) of the Act.¹¹ The theory of the General Counsel's case

is that Respondent, before deciding to close the Redwood City terminal, failed to afford the Union a reasonable opportunity to bargain about the decision to close and about the effect that the decision would have upon the bargaining unit employees. Respondent takes the position that, in view of the Union's lack of diligence in enforcing its representational rights, the Union waived any such rights that it might have had in this case and because of this it is not necessary for me to decide whether Respondent was obligated to bargain with the Union about its decision to close the terminal, or whether Respondent as a matter of fact satisfied its statutory obligation to engage in decision and effects bargaining with the Union.

When an employer notifies a union that it is considering making changes which will affect employees' terms and conditions of employment within the meaning of the Act, it is incumbent upon the Union to act with due diligence in requesting bargaining. See *City Hospital of East Liverpool*, 234 NLRB 58 (1978), and *Clarkwood Corp.*, 233 NLRB 1172 (1977). However, "[n]otice, to be effective, must be given sufficiently in advance of actual implementation of a decision to allow reasonable scope for bargaining Indeed, '[n]o genuine bargaining . . . can be conducted where [the] decision has already been made and implemented.' . . . Notice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated." *Ladies Garment Workers v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972). Or stated in other words, in cases where a union, despite prior notice, fails to request bargaining, the question is "whether in the light of all the circumstances there existed reasonable opportunity for the Union to have bargained on the question before unilateral action was taken by the employer. Notice is important only as it bears upon whether there actually was such opportunity." *Rose Arbor Manor*, 242 NLRB 795, 798 (1979) (cases cited). Accordingly, where "it is plain that a formal request to bargain by the Union would have been futile," the union's failure to respond to an employer's invitation to bargain about a proposed change which will have a significant impact upon employees' terms and conditions of employment is no defense to the employer's unilateral action. *Ibid*.

In the instant case Livesay's June 22 and 23 letters to union business representative Baker informed the Union that Livesay was seriously considering closing the Redwood City terminal and invited the Union to discuss this matter with him before he reached his decision, but cautioned the Union that if by July 1 the Union had not responded to the invitation Livesay would reach a decision without considering the Union's position. The Union failed to respond to Livesay's invitation,¹² and on July 2

ly motivated. In fact, the record indicates and I find that Respondent closed the terminal for legitimate economic reasons.

¹² I reject the General Counsel's assertion that "the Union was . . . entitled to rely on the July 6 meeting date, and thus to assume that the arrangement with Respondent to meet on that day superseded the July 1 deadline set forth in the June 22 and June 23 letters." The record does not establish that Respondent's June 21 agreement to meet with the Union on July 6 for contract negotiations was calculated to lead the Union to believe that the July 1 deadline set forth in Respondent's June

Continued

¹⁰ Respondent leased the Redwood City terminal on a month-to-month basis and before terminating the lease was required to give at least 30 days' notice. The lease terminated at the end of each month and at the time of the closure Respondent had not given the required notice.

¹¹ The complaint does not allege that the closing of the Redwood City terminal was motivated by union animus or was otherwise discriminatory.

Livesay decided to close the Redwood City terminal for economic reasons.¹³ There is absolutely no evidence whatsoever that, if the Union had responded timely to Livesay's invitation to discuss his contemplated decision to close the terminal, a request by the Union to engage in decision and/or effects bargaining would have been futile. As a matter of fact there is no evidence that the Union's failure to make a timely response to Livesay's invitation to bargain was prompted by the Union's belief that Livesay had already decided to close the terminal and hence it would have been futile for the Union to discuss the matter with Livesay. Likewise, the record does not reveal that there was insufficient opportunity for the Union to engage in decision and/or effects bargaining prior to Respondent's decision to close the terminal. In this regard it would be unwarranted for me to conclude that if the Union had made a timely response to Livesay's June 22 or 23 invitation to bargain Livesay would have gone ahead on July 2 and closed the terminal without affording the Union an opportunity to discuss the

23 letter had been superseded by the July 6 negotiation date. Quite the contrary, the plain language of Respondent's June 23 letter should have reasonably alerted the Union that it had better contact Respondent by July 1 if it expected Respondent to consider the Union's position before deciding whether or not to close the Redwood City terminal. In view of the plain language of the June 23 letter it is not surprising that there is absolutely no evidence whatsoever in the record that it was the Union's belief that Respondent intended to deal with the matter raised in its June 22 and 23 letters on July 6 which resulted in the Union's failure to respond to Respondent's June 23 letter.

¹³ The General Counsel's assertion that "in all likelihood Respondent had made its decision to close the Redwood City terminal well in advance of July 2, but chose not to notify the Union until just before closing, thereby effectively foreclosing the Union from having an opportunity to bargain over this decision" has no support in the record.

matter. It is just as likely that Respondent would have arranged to meet with the Union to discuss the contemplated closure of the terminal and its effects upon the unit employees and would have either reached some sort of an agreement with the Union about these matters or bargained in good faith with the Union until an impasse was reached, and only then close the terminal.

Based upon the foregoing I find that the Union, prior to Respondent's decision to close the Redwood City terminal, had an adequate opportunity to request bargaining about the decision and its effect upon the unit employees, and that by failing to timely request such bargaining the Union effectively waived its right to assert that Respondent's conduct in closing the terminal constitutes unilateral action in violation of Section 8(a)(5) and (1) of the Act.¹⁴ It is for this reason that I shall recommend that the complaint in this case be dismissed in its entirety.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁵

The complaint is dismissed in its entirety.

¹⁴ Since I have found that the Union had ample notice of the contemplated decision to close the terminal and failed to timely request bargaining, I find it unnecessary to pass on Respondent's other defenses to the allegations of the complaint.

¹⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.